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IN THE
Supreme Court of the United States

UNITED STATES OF AMERICA, ET AL.,
Petitioners,

v.

STATE OF TEXAS, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR INTERVENORS-RESPONDENTS JANE DOES

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INTRODUCTION

Respondents' brief proves that their grievance is a mere political dispute that does not belong in federal court. While they argue without support that they can sue to enjoin the Executive's immigration enforcement decisions based on incidental budgetary costs, they fail to explain how those costs are actual or imminent, certainly impending, or fairly traceable to the Guidance. Moreover, their concessions negate redressability and reveal the internal inconsistency of their arguments.

Respondents now admit that the Secretary could lawfully decline to remove every single immigrant who meets the Guidance's eligibility criteria—including by affirmatively granting hypothetical "low-priority identification cards" on a class-wide basis. Resps.' Br. 39 (quotation omitted). But the relief they admit the Secretary *can* grant is no different in effect from deferred action under the Guidance, and it would *also* allow recipients to apply for work authorization and benefits by operation of other laws. Pet. App. 413a. Being "lawfully present" in this way does not mean that the non-citizen receives an immigration status or classification, and it does not bestow substantive rights or provide a defense to removal. Pet. App. 419a. Rather, the phrase "lawfully present," which is not defined in the INA, is an informal term describing the condition necessarily resulting *either* from having lawful immigration status under the INA, *or* from being a removable non-citizen whose presence is known to and temporarily tolerated by the Secretary under the enforcement discretion Respondents admit he possesses.

This admission concedes Respondents' case. Their alleged injuries are not redressable because, while they speculate that enjoining the Guidance will eliminate all costs allegedly resulting from grants of deferred action, they admit the Secretary could still defer removal for all DAPA-eligible immigrants even if the Guidance remains enjoined. Their APA claims fail, because there is no difference between grants of deferred action under the Guidance and the deferred removals Respondents admit are lawful and unreviewable. Resps.' Br. 39, 69.

Finally, Respondents' admission forecloses their purported claim under the Take Care Clause. Even if the Clause allowed justiciable claims against the Executive, the Guidance constitutes a faithful attempt to enforce immigration law by channeling discretionary relief on a case-by-case basis to help ensure uniform enforcement, consistent with the priorities set by Congress. Because Respondents concede that such relief is lawful, their claims fail.

ARGUMENT

I. THERE IS NO STANDING

A. Respondents Cannot Sue Because The Guidance Does Not Affect Their Sovereign Interests

Respondents ask the Judiciary to interfere with the Executive's enforcement of immigration law, thereby violating the separation of powers. But federal court is not the "forum in which to air [one's] grievances about the conduct of government or the allocation of power in the Federal System." *Valley Forge Christian Coll. v. Americans United for Separation of Church & State*, 454 U.S. 464, 479 (1982).

Respondents have no sovereign interest in the enforcement of immigration law, *Arizona v. United States*, 132 S. Ct. 2492, 2506-07 (2012); *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 897 (1984), and thus may not use the federal courts to "usurp the powers of the political branches." *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1146 (2013).

Respondents seek to avoid this bar with the pretext that they are actually "asserting an interest in avoiding financial harm[.]" Resps.' Br. 20-21. But incidental costs to a State's budget cannot give standing to challenge the Executive's conceded power over immigration enforcement. *Arizona*, 132 S. Ct. at 2506-07; Does' Cert. Br. 16-17. In their brief, Respondents argue that a bare financial injury to a State's budget counts as an injury to "proprietary" or "sovereign" interests giving standing to sue the United States. Resps.' Br. 21. Their only support for this novel proposition—which would allow States to sue the federal government in almost any situation—is a single treatise section confirming that States have standing when their *ownership* interests over State lands are implicated, or when a federal statute preempts State law. Resps.' Br. 21 (citing 13B Charles A. Wright et al., *Federal Practice & Procedure* § 3531.11.1 & nn.4-5 (3d ed. 2008)). The single decision the treatise cites addressing a financial injury without more held that Wyoming *lacked* standing to challenge a regulation that might incidentally decrease its tax revenues and increase its expenses, and the decision echoed concerns that a State's suit for mere budgetary harm presents "only a generalized grievance and holding otherwise might spark a wave of unwarranted litigation against the

federal government." *Wyoming v. Dep't of Interior*, 674 F.3d 1220, 1231-36 (10th Cir. 2012) (original typo corrected).

As Respondents' former *counsel* (and current *amicus*), then-Texas Attorney General Greg Abbott, admitted four days after filing this suit, the asserted financial harms are a mere pretext to invoke jurisdiction. Under questioning, counsel admitted that "*we're not suing for that economic harm.* It's the way that Texas has been impacted that gives us standing. What we're suing for is *actually* the greater harm, and that is harm to the constitution by empowering the president of the United States to enact legislation on his own without going through Congress." J.A. 268 (Dec. 7, 2014 interview) (emphasis added). There could be no clearer expression of a generalized grievance. The philosophical dispute Texas has with the Executive does not provide standing.[1]

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[1] Respondents claim an interest in avoiding financial pressure to change their driver's-license fees, arguing that pressure "to make a different and less desirable choice is itself a cognizable injury." Resps.' Br. 22 (alterations omitted). This argument would convert every budgetary cost resulting from a federal policy decision into a sovereign interest triggering standing. Regardless, Respondents do not argue that the Guidance preempts State law or otherwise prevents them from charging applicants the actual costs of issuing driver's licenses. Indeed, the Ninth Circuit recently refused to hold that the 2012 DACA initiative has preemptive effect. *Arizona Dream Act Coalition v. Brewer*, 2016 WL 1358378, at *12-14 (9th Cir. Apr. 5, 2016) (holding the *INA* preempts a State executive order creating new immigration classifications).

B. The Alleged Financial Injuries Do Not Meet The Requirements Of Injury-In-Fact, Causation, Or Redressability

Even if an asserted financial injury to a State's budget could support standing without more, Respondents' particular allegations fail.

1. The Does' opening brief explained why Texas's alleged costs of issuing driver's licenses do not suffice for standing. Does' Br. 29-35. Respondents do not attempt to rebut these points, instead arguing that this Court must defer to the district court's conclusory statements about financial injury, made at the preliminary injunction stage without the benefit of an evidentiary hearing. Resps.' Br. 19-20. But this Court rigorously examines claims of standing based on allegations of future harm, and Respondents' claims simply do not measure up as a matter of *law*. *Clapper*, 133 S. Ct. at 1147-51.

The district court's conclusion that implementing the Guidance would make Texas spend money—the only injury it held sufficient for standing—is unsupported. Without making factual findings, that court concluded that "[i]f the majority of DAPA beneficiaries currently residing in Texas apply for a driver's license, it will cost the state $198.73 to process and issue each license, for a net loss of $174.73 per license. Even if only 25,000 of these individuals apply . . . Texas will still bear a net loss of $130.89 per license, with total losses in excess of several million dollars." Pet. App. 272a (citation omitted). However, the *only* evidence supporting this conclusion is a single, cursory declaration making vague "estimates" about expenses Texas's Department of Public Safety

(DPS) might incur to process an influx of applications. J.A. 380.

Critically, that declaration speculates there will be a mass influx of DAPA applications, which the history of Family Fairness shows is in no way guaranteed.[2] Moreover, it does *not* claim that issuing a license actually costs Texas a certain amount—a claim that would be untenable since Texas makes a profit in the ordinary course of business from the $25 license application fee. Tex. Dep't of Pub. Safety, *Operating Budget for Fiscal Year 2014*, II.A.2, III.A.38, IV.D.5 (Dec. 1, 2013).[3] Instead, without explaining how it arrived at these numbers or how many applications a DPS employee can process in a given time period, the declaration speculates that an influx of applications would cause "expenses that DPS would incur to hire and train . . . additional [employees], purchase additional office equipment and technology . . . [and] open additional driver license offices or expand current facilities." J.A. 379-80. The declaration "estimates" tiers of possible

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[2] Respondents correctly state that approximately 47,000 immigrants *applied* for Family Fairness, Resps.' Br. 54, but this was a small fraction of the approximately 1.5 million *eligible* to apply. Does' Br. 12-13. Like the Guidance, Family Fairness did not automatically grant relief, and ultimately few individuals chose to seek relief. With respect to the Guidance, the temporary, revocable nature of relief means that the initial application pace is likely to be slow and uneven, particularly in light of the pending presidential election.

[3] Respondent Texas's official publications are judicially noticeable. *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 199 n.18 (2008). DPS charges a $1 administrative fee with the $24 statutory fee. Tex. Dep't of Pub. Safety, *Driver License Division*, https://www.txdps.state.tx.us/DriverLicense/fees.htm.

costs, but it does not explain what these lump-sum costs consist of, why (or at what point) hiring new employees would be necessary to handle increased application volume, or why 100% of the *two-year* cost of hiring employees, buying equipment, and opening new office space is an injury caused by the Guidance. J.A. 380. Over two years of employment, assuming 50 five-day workweeks per year, these employees would only have to process an average 1.62 applications daily, leaving their time mostly free to do other profitable work and offset any putative additional costs. J.A. 380.

Thus, the declaration does not show that Texas *will* suffer injury, but simply speculates that an assumed influx of license applications *could* cause DPS to expend resources on new employees and office space—uncertain future occurrences that are not certainly impending. *Clapper*, 133 S. Ct. at 1147, 1151. Likewise, while the declaration speculates that *DPS's* expenses could increase, it is silent as to how the Guidance would affect *Texas's overall budget*. Issuing licenses not only promotes Texas's stated policy interests in issuing licenses to drivers, including all *other* recipients of deferred action; it also decreases public safety costs and increases revenues from gasoline taxes and vehicle-registration fees. Does' Br. 33-34. As discussed in this Court's taxpayer standing cases, a governmental entity's decision to make expenditures in one field often causes its other revenues to increase, thus making it conjectural that the entity as a *whole* will suffer injury in fact. *E.g.*, *Arizona Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 136 (2011). Speculation that Texas's *overall budget* will suffer a net loss if the

Guidance is implemented cannot provide standing.

2. Respondents cannot base standing on the claim that the Guidance will cause them to incur health care, educational, and law enforcement costs. Resps.' Br. 27-30. Even if undocumented immigration is revenue-negative for Respondents' budgets—an easily disputed hypothesis—these alleged costs "are not caused by DAPA" but rather result from a stable population of undocumented immigrants already resident in the country. Pet. App. 309a.

Respondents' only argument that the Guidance might impose *additional* costs of this kind is that it could cause some resident immigrants to remain in the United States instead of returning to their countries of origin. Resps.' Br. 28-29. This is just "speculation about the complex decisions of non-citizens" who consider "the myriad economic, social, and political realities in the United States and in foreign nations" in deciding whether to immigrate or emigrate. *Arpaio v. Obama*, 797 F.3d 11, 21 (D.C. Cir. 2015). The district court itself rejected Respondents' argument as "without supporting evidence," stating that "the presence of damages . . . is too speculative to be relied upon." Pet. App. 313a.

Indeed, long-term resident immigrants eligible for deferred action under the Guidance are very unlikely to emigrate of their own accord, given that doing so could separate them from their U.S. citizen children. And, in any case, the Guidance is likely to *decrease* State law enforcement costs by helping DHS to focus its limited enforcement resources on removing serious criminals instead of non-criminals like the Does, and by allowing deferred action recipi-

ents with work authorization to better support themselves and reduce their and their children's reliance on State-funded health services. *Arpaio*, 797 F.3d at 24.

3. Respondents' concession that the Secretary can defer removal on a class-wide basis for *all* individuals eligible under the Guidance—including by affirmatively issuing them "low-priority identification cards"—defeats redressability for all alleged injuries. Resps.' Br. 39 (quotation omitted). Even without work authorization, individuals receiving such relief would be "lawfully present" as that informal term is understood and thus able to apply for Texas driver's licenses just as if they had received deferred action under DAPA, and such individuals would be similarly incentivized not to return to their countries of origin. Enjoining the Guidance would not redress the financial injuries Respondents complain of, demonstrating lack of standing.

C. *Massachusetts v. EPA* Is Inapposite

Not satisfied with misrepresenting to this Court that States can have true *parens patriae* standing against the United States,[4] Respondents argue that *Massachusetts v. EPA*, 549 U.S. 497 (2007), relaxes the standing requirement for their suit. Resps.' Br. 31-32. Not so. *Massachusetts* applies only when the alleged injury and its cause are undisputed and the

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[4] *Compare* Resps.' Br. 31 ("*[P]arens patriae* standing is available to the States. Nothing bars such a *parens patriae* action against the federal government."), *with Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 610 n.16 (1982) ("A State does not have standing as *parens patriae* to bring an action against the Federal Government.").

harm incrementally worsens with increasing volume; in addition, the harm must be generalized across society and emanate from many sources. *Massachusetts*, 549 U.S. at 521-26. In this narrow context, States can sue if they have an affected "quasi-sovereign" interest *and* an express procedural right protecting that particular interest. *Id.* at 520.

Here, Respondents have neither. They do not have a procedural right allowing them to protect their asserted financial interests. While the Clean Air Act provision allowing suit to challenge rulemaking petition denials was closely tailored to Massachusetts's interests, Respondents here can only point to the general APA cause of action, 5 U.S.C. § 706. *Massachusetts*, 549 U.S. at 520 (citing 42 U.S.C. § 7607(b)(1)). That cause of action is not closely tailored to the generic financial injuries they claim, and Congress has not created a specific procedural right allowing challenges to immigration policy decisions. Moreover, the procedural-right requirement would be meaningless if satisfied by the general APA cause of action.

Furthermore, even if Respondents had a procedural right, they lack the quasi-sovereign interest necessary to show a particularized injury. A mere budgetary loss, without a more complete accounting of all effects, does not implicate a State quasi-sovereign interest in the well-being of the populace, and is more akin to a speculative generalized private injury. As noted, States' unique interests go to the *physical domain* within their borders. *Massachusetts* reiterated that States (but not private litigants) have standing to protect these "quasi-sovereign" interests by suing to prevent loss of land from rising

sea levels caused by greenhouse-gas emissions. *Id.* at 518-23. Because it had unique interests in its capacity as a State, Massachusetts could sue even though a similar injury to a private landowner not possessing such interests would be insufficiently particularized. *Id.* at 521-23.

In contrast, Respondents' allegations are speculative, and their alleged interest in avoiding financial injury insufficient. Even though immigration policy is *important* to Respondents, they do not have a quasi-sovereign *interest* in regulating immigration or in avoiding financial costs of immigration in the way that they have an interest in regulating pollution harming their physical territory. *Arizona*, 132 S. Ct. at 2496-97, 2506-07. While the interest in *Massachusetts* was unique to the State, the financial interest Respondents assert is no different from that asserted by private litigants who have already unsuccessfully tried to challenge the Guidance. *Arpaio*, 797 F.3d at 21.

Finally, Respondents' alleged injury is fundamentally unlike that in *Massachusetts*, which worsened incrementally but indisputably (and without the possibility of offsetting the loss of land) with every additional carbon dioxide molecule emitted. *Massachusetts*, 549 U.S. at 523-25. Thus, redressability was satisfied because even though emissions had many distinct sources, the EPA could act to regulate some of those sources and reduce *some* emissions, thereby incrementally redressing the injury. *Id.* at 525-26. Unlike in *Massachusetts*, Respondents' alleged injury does not incrementally increase with each grant of deferred action because not all recipients will apply for licenses, Texas will not need to

expand its infrastructure to accommodate any single applicant, and applicants pay taxes and fees that offset costs. Respondents lack standing.

II. RESPONDENTS' APA CLAIMS FAIL

A. "Lawful Presence" Is Not A Status Or Classification Established By Congress

Nearly all of Respondents' arguments under the APA rest on the false premise that "lawful presence" is a formal immigration status or classification that conveys attendant benefits, and thus that only Congress can bestow "presence." They assert throughout their brief that "lawful presence" "plac[es] aliens in a *legal status* with significant consequences" and "deem[s] the unlawful conduct of millions of aliens to be lawful." Resps.' Br. 40 (emphasis added). At the same time, they now admit that the Secretary has authority to defer removal for DAPA-eligible immigrants, and that these deferrals are unreviewable under the APA. Resps.' Br. 39, 69. This concession highlights the incoherence of their arguments.

Neither "lawful presence" nor "lawfully present" is a term of art in immigration law, much less a status or classification created by Congress. The specific phrase "lawful presence" does not even appear in the INA, and the term "lawfully present" is only informally understood to be the condition that results *either* (1) when a non-citizen has a lawful immigration status pursuant to the INA, *or* (2) when the Secretary knows that a removable non-citizen is present and temporarily declines to remove her—including

by granting deferred action.[5] *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483-84 (1999). In both situations, the non-citizen is present in a fashion that DHS describes as being "lawfully" present.

However, whether a non-citizen is lawfully present is separate from and does not affect whether she has an immigration status, or whether she is admissible, removable, or eligible for visas or adjustment of status. This understanding is confirmed by the Guidance itself, which states that "[o]nly an Act of Congress can confer" eligibility for status or substantive rights, and which recognizes that "[d]eferred action does not confer any legal status in this country, much less citizenship; it simply means that, for a specified period of time, an individual is permitted to be lawfully present in the United States." Pet. App. 413a.

The statutes in which the term "lawfully present" appear further confirm that the condition is an informal one separate from immigration statuses or defined concepts like admissibility and removability. Whether a non-citizen is removable depends not on whether she is "lawfully" present but on whether she is "present in the United States in violation of this chapter or any other law of the United States." 8 U.S.C. § 1227(a)(1)(B). In determining whether she can meet her burden to defend against removal,

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[5] Other examples of discretionary relief from removal not specifically authorized by statute include orders of supervision, granted to individuals already ordered removed, and "parole in place," granted to undocumented family members of U.S. servicemembers.

what matters is not being "lawfully present" but whether, in relevant part, she can demonstrate she is not removable or inadmissible—including that she is "lawfully present in the United States *pursuant to a prior admission*." *Id.* § 1229a(c)(2)(B) (emphasis added). In another context, whether she can become eligible for certain Social Security benefits depends on if she is "lawfully present" as "determined by the [Secretary]." *Id.* § 1611(b)(2)-(4). And whether she is "unlawfully present" for purposes of the reentry bars depends on whether she is "present in the United States after the expiration of the period of stay authorized by the [Secretary]" or "present in the United States without being admitted or paroled." *Id.* § 1182(a)(9)(B)(ii).

Respondents attempt to confuse matters by claiming that the "lawful presence" supposedly granted by the Guidance is a status or classification similar to or overlapping with defined statutory terms such as admissibility, status, parole, visas, and removability. Resps.' Br. 2-6. But the Guidance does not affect eligibility for these things because deferred action does not grant "admission" into the United States, confer eligibility to adjust to an immigration status, or undo the original improper entry rendering the recipient removable. As discussed, what being "present" means varies by provision, but it has no real definition other than the informal understanding that someone is present in accordance with the INA or at the Secretary's discretion.

Without the misconception that "presence" is something other than the condition of having removal deferred, Respondents' arguments fall apart. Their suit depends on artificially distinguishing the

non-existent immigration status of "lawful presence"—which they claim the Executive cannot grant—from the longstanding practice of deferring removals, which they admit the Executive *can* do, even on a class-wide basis. Resps.' Br. 39. But being lawfully present under the Guidance pursuant to a discretionary grant of deferred action is the *exact same thing* as having removal deferred—and it has always been understood in this way. *Reno*, 525 U.S. at 483-84. For purposes of the Guidance, "legal *presence* simply reflects an exercise of discretion by a public official"—nothing more. Pet. App. 222a (Higginson, J., dissenting) (emphasis original, quotation omitted). Because Respondents concede that deferral of removal—*deferred action*—is unreviewable and lawful, they cannot plausibly maintain that the condition of being "lawfully present," the inherent result of deferred action, renders the Guidance reviewable and unlawful.

B. The Guidance Is Not Reviewable Under The APA

With Respondents' concession laying bare the false premise that the Guidance "plac[es] aliens in a legal status with significant consequences," their reviewability arguments fail. Resps.' Br. 39-40. They misapply *Heckler v. Chaney*, 470 U.S. 821 (1985), failing to comprehend that the Guidance is properly understood as establishing uniform standards to apply in exercising prosecutorial discretion, a matter "committed to agency discretion by law." 5 U.S.C. § 701(a)(2).

Respondents concede, as they must, that *Heckler*'s presumption of unreviewability applies to "an

agency's decision not to take enforcement action." Resps.' Br. 38 (citation omitted). The Guidance is a prototypical example of an agency decision *not to exercise* its enforcement authority in certain circumstances. *Heckler*, 470 U.S. at 828. And this Court's deference to agency nonenforcement decisions makes particular sense in the removal context, where, "[d]ue to limited resources, DHS and its Components cannot respond to all immigration violations or remove all persons illegally in the United States." Pet. App. 412a.

Contrary to Respondents' insistence that the Guidance "transform[s] unlawful conduct into lawful conduct," Resps.' Br. 41, deferred action under the Guidance is no different from *all other* grants of deferred action, including those endorsed in *Reno*, 525 U.S. at 483-84 & n.8, or from other forms of relief temporarily allowing non-citizens to remain in the United States. *Supra*, at 12-15. Moreover, the Guidance does not itself *grant* deferred action; it simply provides "specific eligibility criteria for deferred action," leaving "the ultimate judgment as to whether an immigrant is granted deferred action [to] be determined on a case-by-case basis." Pet. App. 419a. Similarly, the Guidance does not purport to grant eligibility for employment and benefits, simply noting that recipients can apply for work authorization that the Secretary can grant under "separate authority." Pet. App. 415a. The Guidance itself grants nothing, so Respondents' attempts to portray it as reviewable agency "action" are unavailing.

Respondents' other argument for reviewability is that "[w]hen Congress intends to create unreviewable power, it uses clear language such as 'sole and

unreviewable discretion.'" Resps.' Br. 42. This misreads *Heckler*. Under APA Section 701(a)(1), reviewability is lacking when "statutes preclude judicial review" using this kind of clear language. 5 U.S.C. § 701(a)(1). But the *Heckler* presumption arises under *Section 701(a)(2)* when such language is *absent*, that is, "where Congress has not affirmatively precluded review" but a "statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Heckler*, 470 U.S. at 830. Respondents cannot rebut the *Heckler* presumption because the INA does not "provide[] guidelines for the agency to follow in exercising its enforcement powers." *Id.* at 832-33. Rather, Congress has expressly granted the Secretary authority to establish enforcement priorities. 6 U.S.C. § 202(5).

As *Heckler* points out, this does not leave Congress without recourse. If it disapproves of the Guidance, Congress can legislate to "limit [the] agency's exercise of enforcement power if it wishes." *Heckler*, 470 U.S. at 833. But it has not done so, and thus the Guidance is unreviewable.

C. The Guidance Is Lawful

1. Respondents rely on the erroneous notion that DAPA grants "lawful presence" to argue the Guidance is unlawful, but they failure to explain how it actually conflicts with any part of the INA or how it differs from any other previous deferred action initiative. The Guidance fits squarely within the Secretary's longstanding authority over the removal system. *Arizona*, 132 S. Ct. at 2506-07. For more than 50 years, DHS and INS before it have issued policies

guiding conferral of deferred action and other forms of discretionary relief, such as the Family Fairness policy of the Reagan and first Bush administrations, which was available to a similar percentage of the undocumented population. Does' Br. 6-13; *see supra*, n.2.

Historical practice supports the Guidance's legality. Respondents incorrectly point to Congress's decision to limit the Secretary's authority to grant parole and voluntary departure as a limit on deferred action. But Congress chose *not* to put statutory limits on the Secretary's ability to grant deferred action, and all statutes mentioning deferred action assume that the Secretary has preexisting authority to grant it. Does' Br. 11 12. Congress's decision to limit only *some* forms of relief shows that it can limit the Executive's authority to grant deferred action at any time but has chosen not to do so. *Bob Jones Univ. v. United States*, 461 U.S. 574, 601 (1983) (congressional acquiescence to agency practice inferred from failure to overrule practice).

2. Respondents also claim the Guidance is unlawful because deferred action recipients may apply for work authorization and certain benefits. Because they concede the Executive's broad prosecutorial authority to defer removal, this is the linchpin of their remaining case. Yet this argument also fails, for whether a benefit is available under another law does not affect the Guidance's legality. Regardless, the Secretary has full authority to grant all these benefits to deferred action recipients.

Respondents claim that deferred action recipients should not be able to receive work authorization, and

that 8 C.F.R. § 274a.12(c)(14)—a regulation promulgated by the Reagan Administration through notice-and-comment rulemaking that extends work authorization eligibility to *all* deferred action recipients—is only lawful as applied to four specific categories of recipients identified by Congress. Resps.' Br. 51 n.39. This argument fails for at least two reasons.

First, the plain text of a key section of IRCA, 8 U.S.C. § 1324a(h)(3), specifically states that the Secretary has power to grant work authorization to immigrants not already authorized by statute: it defines an "unauthorized alien" for employment purposes as someone who is not "authorized to be so employed by this chapter *or by the [Secretary].*" 8 U.S.C. § 1324a(h)(3) (emphasis added). This means that the Secretary has discretionary authority to define new categories of immigrants who may lawfully work. Respondents' citation-free argument that this provision means something other than what it says is frivolous. Resps.' Br. 53. Their interpretation would render the second clause surplusage because it would only allow work authorization for categories of immigrants already specified by statute, leaving no work to be done by the clause "or by the [Secretary]." 8 U.S.C. § 1324a(h)(3). Second, Section 1324a(h)(3) was enacted with the understanding that the Secretary *already* had authority to grant work authorization to all recipients of deferred action, as prior regulations allowed. 46 Fed. Reg. 25,079, 25,079-81 (May 5, 1981). Instead of limiting this preexisting authority, Section 1324a(h)(3) reaffirmed it.

The Secretary's authority to suspend accrual of unlawful presence for purposes of the reentry bar is

similarly grounded in the INA, which treats undocumented immigrants as "unlawfully present" for purposes of the reentry bar if they are "present in the United States after the expiration of the period of stay authorized by the [Secretary] or [are] present in the United States without being admitted or paroled." 8 U.S.C. § 1182(a)(9)(B)(ii). This provision specifically contemplates that the Secretary may authorize an immigrant to remain in the United States without accruing unlawful presence. Accordingly, regulations interpret a "period of stay authorized by the [Secretary]" to include periods when an immigrant is a recipient of deferred action.[6] 8 C.F.R. § 214.14(d)(3); 28 C.F.R. § 1100.35(b)(2). The same is true of eligibility for benefits like Social Security. Here, again, the statute gives the Secretary authority to "determine[]" which immigrants are "lawfully present in the United States" for purposes of being eligible for these benefits, 8 U.S.C. § 1611(b)(2)-(4), and formal regulations treat deferred action recipients as lawfully present for these purposes. 8 C.F.R. § 1.3(a)(4)(vi); 42 C.F.R. § 417.422(h).

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[6] If this Court believes these regulations unlawful, the remedy is not to invalidate the Guidance, but to state that deferred action recipients are not eligible for suspension of accrual. Regardless, such an order would have minimal effect. Because over a year has passed since the date the Guidance sets as the date when applicants must have been present without lawful status, all potential DAPA applicants, with the exception of a limited number of individuals eligible for tolling independent of deferred action, will have already accrued the time necessary to trigger application of the maximum 10-year bar.

D. The Guidance Is A Non-Binding Policy Statement Exempt From Notice-And-Comment

Respondents' argument that the Guidance is subject to APA notice-and-comment procedures also rests on their error that DAPA creates "rights and obligations" because it "grants lawful presence and eligibility for benefits." Resps.' Br. 61, 69 (citations omitted). Again, the Guidance does not confer status, deferred action, work authorization, or other benefits available under other laws. It lacks the "important touchstone" of legislative rules requiring notice-and-comment: an *immediate legal effect* on rights and obligations. *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979). Instead, the Guidance attempts to avoid "blindly enforc[ing]" the immigration laws "without consideration given to the individual circumstances of each case." Pet. App. 412a. As a policy statement operating prospectively to help direct the case-by-case exercise of the Secretary's discretionary power, the Guidance is exempt from notice-and-comment. Does' Br. 44-49.

Respondents urge the Court to disregard the cautious, discretionary language of the Guidance as "mere[] pretext," Pet. App. 56a, and declare DAPA binding as a practical matter before it is even implemented. But courts should consider how a policy statement is applied in practice only when its "language and context . . . are inconclusive." *Pub. Citizen, Inc. v. Nuclear Regulatory Comm'n*, 940 F.2d 679, 682 (D.C. Cir. 1991). The Guidance's operative language instructing employees how to evaluate applications is clear: employees should review applications "on a case-by-case basis," "exercise . . . discre-

tion," and use "judgment." Pet. App. 417a, 419a. Further, it states that employees considering applications should determine whether each applicant is a priority for removal, meets the other specified DAPA criteria, and "present[s] no other factors that, in the exercise of discretion, make[] the grant of deferred action inappropriate."[7] Pet. App. 417a.

As the dissent below noted, this case presents the first time an unimplemented policy statement has been enjoined based on speculation that employees *might* interpret it as binding. Pet. App. 131a-132a (King, J., dissenting). There is no record evidence that employees would treat the Guidance as "controlling in the field." *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1021 (D.C. Cir. 2000). Nor could there be, because the Guidance has never been implemented. Respondents nevertheless suggest that the Court may "extrapolat[e]" evidence—as the courts below did—from the implementation of 2012 DACA while ignoring critical differences between the two initiatives. Pet. App. 59a. But DAPA's use of new discretionary criteria alone makes evidence of DACA's implementation an unreliable predictor of how DHS would implement DAPA. Does' Br. 47-49.

Respondents mislead this Court by asserting there is "concrete evidence concerning DAPA's implementation" in the Executive's accidental grant of three-year deferred action terms (and work authori-

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[7] Respondents focus on mandatory language in the Guidance's *procedural* sections, directing employees to "establish a process" to accept applications. Resps.' Br. 64. That language constitutes "rule[s] of agency organization, procedure, or practice" exempt from notice-and-comment. 5 U.S.C. § 553(b)(A).

zation cards) in the period before and just after the Guidance was enjoined. Resps.' Br. 65. These expanded terms were given only to individuals already eligible for deferred action under the 2012 DACA initiative, *not* to individuals newly eligible for deferred action under the Guidance. J.A. 729, 753-54. Neither the expanded DACA nor the DAPA criteria have ever been put into effect, so there is no evidence of how they would be implemented.

Finally, Respondents argue that the Guidance must be a legislative rule carrying force of law because it has the potential to affect many people.[8] Resps.' Br. 60. But the APA's exemptions from the notice-and-comment process are "categorical"—the breadth of an initiative's effects is immaterial where the initiative is otherwise exempt. *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1206 (2015). Holding otherwise would impose procedural requirements beyond what Congress has established, violating a bedrock principle of administrative law. *Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 524 (1978).

III. RESPONDENTS CANNOT ASSERT A CLAIM UNDER THE TAKE CARE CLAUSE

Respondents' arguments under the Take Care Clause consist of repackaged statutory claims and an inapposite discussion of English legal history that

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[8] This appears to be an attempt to revive the "substantial impact" test that nearly every circuit long ago abandoned. *E.g.*, *Pub. Citizen v. Dep't of State*, 276 F.3d 634, 640 (D.C. Cir. 2002); *Mada-Luna v. Fitzpatrick*, 813 F.2d 1006, 1016 (9th Cir. 1987); *Baylor Univ. Med. Ctr. v. Heckler*, 758 F.2d 1052, 1061 (5th Cir. 1985).

adds no analysis. Neither approach rebuts the fact that the Clause defines Executive power without giving rise to a cause of action, and Respondents cannot identify any case holding otherwise. Does' Br. 55-56; *cf. Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (Take Care Clause asserted as defense by Executive). Even if a claim could be asserted under the Clause, it would not be justiciable, for the Clause does not provide "judicially discoverable and manageable standards for resolving" whether the Executive has "faithfully" applied enforcement discretion. *Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1428 (2012).

In any event, any theoretical claim under the Clause fails with Respondents' false premise that the Guidance confers legal status. Resps.' Br. 74. As they concede, there is nothing unlawful about deferring removals. Resps.' Br. 39. The Guidance constitutes faithful execution of the immigration laws by setting criteria for uniform exercise of the Executive's enforcement discretion, reducing the danger that such discretion—a clear and longstanding part of immigration law—would be implemented in an arbitrary and inconsistent fashion. It was not a radical move for the Secretary to issue the Guidance as a focusing mechanism for enforcement. In fact, it was the only course of action consistent with his obligation to faithfully execute the laws given the practical challenges posed by insufficient congressional appropriations. Does' Br. 14-15.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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